MOTION FILED
JAN 6 1982

No. 80-2150

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

DONALD FINNEGAN, *et al.*,
Petitioners,

—versus—

HAROLD D. LEU, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* AND BRIEF OF NATIONAL LABOR LAW CENTER OF THE NATIONAL LAWYERS GUILD AS *AMICUS CURIAE*

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MOTION OF THE NATIONAL LABOR LAW CENTER OF THE NATIONAL LAWYERS GUILD FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE*

Pursuant to Rule 42(3), the National Labor Law Center of the National Lawyers Guild respectfully moves for leave to file the accompanying brief as *amicus curiae.* Neither petitioners nor respondents have consented to the filing of this brief.

The National Labor Law Center of the National Lawyers Guild (sometimes hereinafter "Labor Law Center") is a project of the National Lawyers Guild, an organization of more than six thousand lawyers, law students and legal workers founded in 1937. The Labor Law Center, founded in 1980, is a non-profit legal and educational organization. It maintains a referral network of labor lawyers and a clearinghouse of information and research on current developments in labor law. It develops educational and training materials for lawyers and labor activists, provides some litigation and counseling services and publishes a journal, *Labor Update*. Its purposes are to assist the efforts of workers to build unions where there are none and to strengthen and democratize their organizations.

The decision in this case will impact generally upon the ability of appointed union officials to express views, opinions, disagreements, etc. within their unions and retain their positions. The decision will also influence the ability of labor unions to insure that those members appointed to positions of responsibility will effectively perform their union duties.

While the disposition of the instant case is of considerable importance, of even greater significance is the analysis which the Court employs in order to resolve the present controversy. That analysis will provide a framework for decisions in the many later cases involving similar situations which are sure to follow.

Guild attorneys have appeared in several similar cases already decided—sometimes on behalf of the removed official seeking reinstatement, sometimes on behalf of the labor organization, sometimes on behalf of a friend of the court. This prior experience has convinced us that neither side to the instant controversy has adequately reconciled the competing considerations which led Congress to enact

the Labor-Management Reporting & Disclosure Act of 1959 (sometimes hereinafter "LMRDA" or "Landrum-Griffin Act").

The petitioners seem to argue that removal of an official for expression violates Section 101(a)(2) of the Act as long as the official has not already engaged in conduct (in furtherance of his expression) which violates the responsibilities of his office. Petitioners would drawn no distinction between appointed and elected officials. They do not acknowledge that union members who are officials have certain responsibilities other members do not and that performance of these responsibilities may be impaired by certain expression.

Respondents make the factor of appointment dispositive. A member removed from union office for expression would never be entitled to reinstatement—regardless of the nature of his expression or the specific responsibilities his position entailed and regardless of the nature of the relationship, or lack thereof, between the expression and the position.

Our view is that the grant of summary judgment in the instant case was proper. We believe, however, that the lower courts reached the correct result for the wrong reasons which should not be adopted by this Court. We believe that whether an official's removal for expression violates Section 101(a)(2) turns upon a careful determination of whether the particular expression at issue precludes the effective performance of the official's specific responsibilities.

Because of the importance of this case to the labor movement and because our approach differs from that of

each of the respective parties, the National Labor Law Center requests leave to submit its views in the annexed brief as *amicus curiae*.

Respectfully submitted,

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BRIEF OF THE NATIONAL LABOR LAW CENTER OF THE NATIONAL LAWYERS GUILD AS *AMICUS CURIAE*

Interest of *Amicus Curiae*

The interest of the *amicus curiae* is set forth at pages i to ii of the foregoing motion for leave to file a brief as *amicus curiae.*

Statutory Provisions

Section 101(a)(2) of the LMRDA, 29 U.S.C. Section 411(a)(2), provides:

> Freedom of speech and assembly.—Every member of any labor organization shall have the right to meet and assemble freely with other members; and to express any views, arguments, or opinions; and to express at meetings of the labor organization his views, upon candidates in an election of the labor organization or upon any business properly before the meeting, subject to the organization's established and reasonable rules pertaining to the conduct of meetings: *Provided,* That nothing herein shall be construed to impair the right of a labor organization to adopt and enforce reasonable rules as to the responsibility of every member toward the organization as an institution and to his refraining from conduct that would interfere with its performance of its legal of contractual obligations.

Section 102 of the LMRDA, 29 U.S.C. Section 412, provides:

> Civil action for infringement of rights; jurisdiction—
>
> Any person whose rights secured by the provisions of this subchapter have been infringed by any violation of this subchapter may bring a civil action in a district court of the United States for such relief (including injunctions) as may be appropriate. Any such action against a labor organization shall be brought in the district court of the United States for the district where the alleged violation occurred, or where the principal office of such labor organization is located.

Introduction and Summary of Argument

Petitioners were business agents in the fourteen thousand member Local 20 of the International Brotherhood of Teamsters. In 1977 they supported the candidacy of Omar Brown, the local's incumbent president who was running for reelection against respondent Harold Leu. The campaign was hotly contested, as had been prior union elections between the Brown and Leu forces.

Leu was narrowly elected. Upon his assumption of the presidency, Leu removed petitioners from their posts as BAs. Petitioners thereupon commenced this litigation alleging they had each been removed because they had opposed Leu's candidacy and that removal on that basis violated Sections 101(a)(2) and 609 of the Labor-Management Reporting & Disclosure Act of 1959, Title 29 U.S.C. Sections 401 *et seq.* ("LMRDA").

Respondents denied petitioners had been removed simply because they had opposed Leu's candidacy. They pointed out that two BAs who had also opposed Leu's candidacy had been reappointed by Leu to their positions. The evidence also indicated that although requested to do so by Brown, petitioners had failed to pledge their support to Leu, prior to the institution of the instant suit.

The District Court found it unnecessary to resolve the dispute, holding that it was not as to a fact which was material to resolution of the case. Assuming petitioners were removed for the reason they alleged, the District Court concluded that summary judgment in favor of the respondents was nevertheless appropriate. It relied primarily on the view that removal of an appointed union official for expressive conduct does not violate the right of expression protected by Section 101(a)(2). The Court of Appeals affirmed on essentially the same ground.

We believe the lower courts reached the correct result, but on the basis of incorrect reasoning. Specifically, we submit that union members who are officials in their union are entitled to the protection of the LMRDA and that an official's removal for expression may in some circumstances violate Section 101(a)(2). If a removal does violate this free expression guarantee, the member would be entitled to an order of reinstatement pursuant to Section 102 of the Act.

Whether an official is elected or appointed is important in determining whether his removal violates Section 101 (a)(2) but is not dispositive. The argument that removal of an appointed official for expression can never violate Section 101(a)(2) rests conceptually on the doctrine of the so-called right-privilege distinction. This concept has been repeatedly repudiated in analogous First Amendment jurisprudence dealing with public employees and should likewise be rejected in the instant union setting.

The real question is whether the particular expression at issue precludes the effective performance of the specific responsibilities assigned the official. In making this determination, a court should examine whether the responsibilities are primarily as representative of union leadership among the membership or vice versa, whether the responsibilities involve policy-making and whether the official has substantial discretion in fulfilling his responsibilities. The court must also consider the degree to which the expression bears upon the performance of those responsibilities and the extent to which it contradicts a union policy or position.

In the instant case summary judgment in favor of the respondents was proper in light of the following considerations: Local 20 business agents, appointed by and serv-

ing at the pleasure of the Local president, serve primarily as agents of that president in carrying out his program; they have both long-range and *ad hoc* policy-making responsibilities; petitioners' support for the candidacy of the incumbent officers arose in the context of a long, acrimonious struggle between the incumbents and their challengers; that support, which occurred in a campaign in which service to the membership was a main issue, bore directly on petitioners' responsibilities, which were primarily in servicing the membership. In these circumstances, it was reasonable for respondent Leu to believe that other members of Local 20 could better fulfill the responsibilities of business agent under his administration.

ARGUMENT

I. A Union Member May State A Cause Of Action For Reinstatement To A Union Position Where It Is Alleged Removal Therefrom Was Based Upon Expressive Conduct By The Member.

At the outset it is necessary to treat certain absolutist contentions which, if accepted, would bar consideration of what we believe to be the fundamental issue in this case. These are: (a) that members who are union officials are not protected by the LMRDA; (b) that removal from a union position for expressive conduct does not affect membership status and hence cannot violate §101(a)(2); and (c) that because removal purportedly does not constitute "discipline" within the meaning of §609 of the Act, 29 U.S.C. Section 529, a Court may not order reinstatement of a removed official.[1]

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[1] This case does not involve a union employee who happens to be a union member but it not an official of the union, for example, clerical staff personnel or a bookkeeper. We do not believe the LMRDA was intended to apply to the discharge of such a person.

The Labor-Management Reporting & Disclosure Act of 1959 affords certain democratic rights to members of labor organizations. Section 3(o) of the Act, 29 U.S.C. Section 402(o), defines "member" as "any person who has fulfilled the requirements for membership in [a labor] organization, and who neither has voluntarily withdrawn from membership nor has been expelled or suspended from membership after appropriate proceedings consistent with lawful provisions of the constitution and by-laws of such organization." Section 101(a)(2), which is the primary basis for plaintiffs' suit herein, expressly applies to "every member." If the language of Section 3(o) is accorded its ordinary meaning, the mere act of becoming an official would not alter one's prior status as a "member" nor, thus, his entitlement to the protection of Section 101(a)(2). And see *Grand Lodge* v. *King*, 335 F.2d 340, 343-344 (9 Cir.), cert. den. 379 U.S. 920 (1964).[2]

Section 101(a)(2) protects union members' rights to (1) meet freely with other members, (2) express views, arguments or opinions and (3) express views at union meetings on candidates for union election or other business properly before the meeting (subject to established and reasonable meeting rules).[3] Thus petitioners' sup-

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[2] The Congressional debates reflect the understanding that the LMRDA Bill of Rights were needed to and would protect union officials as well as ordinary members. See 105 Congressional Record 4813 (April 22, 1959), II Legislative History of the Labor-Management Reporting & Disclosure Act of 1959 (hereinafter "Leg. Hist. of LMRDA") 1105 (Sen. Mundt) and 105 Cong. Rec. 5823 (April 22, 1959), II Leg. Hist. of LMRDA 1115 (Sen. Goldwater).

[3] That part of Section 101(a)(2) which confers rights upon union members was divided by semi-colons in order to make clear that each of the three rights created was independent of the other two. See 105 Cong. Rec. 6717-6726 (April 25, 1959).

porting the candidacy of a member for election to union office is expression within the scope of Section 101(a)(2).

That section created new incidents of union membership: it created certain membership rights and, concomitantly, limited union reprisals for the exercise of those rights. When a member is removed from a union position for expression, his membership is thereby affected. He is both penalized for the exercise of a right of membership and his speech is rendered less effective. Removal denies him access to membership and information and the credibility he enjoyed in his position, which increased the effectiveness of the member's expression. Accordingly, removal for expression would serve to limit expression by union members and thereby impact upon their status as members.

If the limitation on freedom of expression were found to violate Section 101(a)(2) under the circumstances of a given case, the member would be entitled to an order of reinstatement. Section 102 of the LMRDA, 29 U.S.C. Section 412, provides in pertinent part:

> "Any person whose rights secured by the provisions of this subchapter have been infringed by any violation of this subchapter may bring a civil action in a district court of the United States *for such relief (including injunctions) as may be appropriate.*" (Emphasis added).

When a member is unlawfully discharged from a union position because of expressive conduct, his statutory right of expression has been "infringed" upon. A mandatory injunction requiring reinstatement would be an "appropriate" remedy for a member discharged from union office for exercise of his Section 101 rights. *Miller* v. *Holden*,

535 F.2d 912, 915-916 (5 Cir. 1976); *Maceira* v. *Pagan*, 649 F.2d 8, 13 (1 Cir. 1981).[4]

None of the foregoing suggests that any member removed from a union position for expressive conduct is *per se* entitled to reinstatement or even that the petitioners here are entitled to a trial of their suit for reinstatement.[4a] It establishes only that such relief is not automatically barred in every case of removal for expressive conduct.

II. Section 101(a)(2) Is Violated Only If A Member Is Removed From A Union Position For Expressive Conduct Which Does Not Preclude The Effective Performance Of The Specific Responsibilities Assigned To That Office.

We are thus brought to the central issue presented in this case: What is the standard for determining whether removal of a member from a position as a union official for expressive conduct violates Section 101(a)(2)? Respondents argue for an elected versus appointed dicho-

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[4] Because reinstatement may be obtained in a proper case pursuant to Section 102, see also 28 U.S.C. Section 2202, it is unnecessary to resolve here the widely debated question whether removal from a union position constitutes "discipline" within the meaning of Section 609 of the LMRDA. Compare, e.g., *Grand Lodge* v. *King*, 335 F.2d 340, 344-345 (9 Cir.), cert.den. 379 U.S. 920 (1964) and *Maceira* v. *Pagan*, 649 F.2d at 13-14 with *Miller* v. *Holden*, 535 F.2d at 914-915. Neither of the courts below addressed this issue.

[4a] In suits like this, the material facts will usually not be in dispute and summary judgment will often be appropriate. This case is a good example. See Point III *infra*.

tomy, that is, Section 101(a)(2) is not violated whenever the removal is of a member who has been appointed to his position. Petitioners, plaintiffs below, argue in essence that there is no distinction between elected and appointed officials in considering the legality of removal. They also appear to argue that if a member could not be disciplined for expression by conventional means such as fine, expulsion or suspension, he cannot be removed from office in reprisal for the same expression.

We respectfully submit that neither of these approaches is consistent with the LMRDA or should be adopted by this Court. Respondents make dispositive a factor which is significant, but one factor among others to be weighed. Petitioners' approach would undercut the ability of labor organizations to function effectively as institutions and to fulfill their obligations.

The "elected versus appointed" dichotomy, as a conclusive distinction, finds no support in the language of Section 101(a)(2) or other provisions of the LMRDA. By contrast, when Congress intended to exclude certain officials from the coverage of part of the Act, it did so by explicitly limiting the coverage of that part of the Act. For example, Title IV only applies to "officers" as that term is rather narrowly defined in Section 3(n) of the Act, 29 U.S.C. Section 402(n).

It is said, however, that a member has no 'right' to hold an appointive position, in contrast to one to which he has been elected. Conceptually, this is an invocation in the union setting of the so-called right-privilege distinction which governed First Amendment jurisprudence regarding public employment. See, e.g., *Adler* v. *Board of Education*, 342 U.S. at 548 (1952).

Just as the impact on the constitutional freedom of expression of forced choice between expression and employment was said to be "remote", *Adler, supra* at 493, so too forcing a union member to choose between expression and a union position is said to have only a "slight" impact on the statutory right of expression. E.g., *Cehaich* v. *Automobile Workers,* 496 F.Supp. 912, 918 (E.D.Mich. 1980).[5] Just as terminating public employees for expression was assertedly not an infringement of the First Amendment because the persons "are at liberty to retain their beliefs and associations and go elsewhere," *Adler, supra* at 492, so too discharging a union official in retaliation for expression supposedly does not violate Section 101(a)(2) because "[t]he dismissed official himself retains the right to continue to express his views as a member . . ." *Cehaich, id.* In short, discharge from a union position supposedly impacts upon official status but not member status,[6] in the same way discharge from public employment was said to impact upon employment but not citizen status. *Adler, id.*

The right-privilege distinction has been firmly repudiated in public employment jurisprudence. *Branti* v. *Finkel,* 445 U.S. 507, 514-517 (1980); *Elrod* v. *Burns,* 427 U.S. 347, 357-359 (1976); *Perry* v. *Sindermann,* 408 U.S. 593, 597-598 (1972); *Wieman* v. *Updegraff,* 344 U.S. 183, 191-

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[5] The District Judge in *Cehaich* was a member of the Court of Appeals panel in the instant case.

[6] E.g., the District Court below stated: "The union leadership can discipline a union steward or agent by removing him from his appointed position, where, as here, the members' rights of free speech as *union members* has [sic] not been affected." 469 F.Supp. at 835 (emphasis in original). See also *Sewell* v. *Machinists Grand Lodge,* 445 F.2d 545, 548 (5 Cir. 1971), cert. den. 404 U.S. 1024 (1972); *Cehaich* v *Automobile Workers, supra* at 915.

192 (1952). Its rejection as a constitutional concept counsels its rejection in construing Section 101(a)(2) as applied to the removal of appointed union officials.

It is now recognized that forcing a person to choose between his position and the exercise of his right of expression has a substantial adverse impact on the latter. *Perry* v. *Sindermann, supra* at 597. This is particularly true in a union setting. Often official positions confer financial reward, prestige, power and influence within the union. A member can be expected to want to retain such a position badly enough that he will refrain from expression that will threaten his continued tenure. Indeed, any member who would seek a union position in the future may be deterred from exercising his statutory right of expression for fear his views will cause union leaders to later deny him appointment to a union position.

The contention that a reprisal discharge impacts upon a member's status as an appointed official but not as a member flows from a one-sided view of membership. The nature of the penalty or sanction is only one factor in determining effect on membership status; equally important is the reason for imposition of that sanction.

By virtue of Section 101(a)(2), freedom of expression is an attribute of union membership status. Thus when a sanction is imposed *as a penalty for the exercise of that freedom,* there is a direct impact on membership status—whatever the form or character of the sanction. Penalizing the right of expression is penalizing the exercise of a right of membership. Forcing a member to choose between his union position and his beliefs substantially chills the exercise of the right of free expression and, because this is a right of membership, this compulsion impacts upon an official's membership status.

To paraphrase *Perry* v. *Sindermann, supra* at 597, even though a member may have no 'right' to an appointed union position and even though the union may deny him that position for any number of reasons, there are some reasons upon which the union may not rely. It may not deny a member an appointed union position on a basis that infringes his interests protected by the LMRDA, especially his interest in freedom of expression guaranteed by Section 101(a)(2). To allow such a denial because of expression protected by Section 101(a)(2) would penalize and inhibit exercise of that freedom. This would allow the union to produce indirectly a result, suppression of expression, which it could not command directly, as by fine, suspension or expulsion. Such interference with Section 101(a)(2) would be impermissable.

There is no statutory requirement that business agents or many other union officials be elected to their positions. Section 401 of the LMRDA, 29 U.S.C. Section 481, requires the election only of officials who are "officers" as defined in Section 3(n). Unions are thus free to appoint or elect other officials as they see fit. A holding that no appointed official could state a cause of action under Section 101(a)(2) for removal from his position would only encourage leaders to appoint persons to fill union positions falling outside Section 3(n) of the Act, rather than permit elections therefor. This would run contrary to the purpose of the LMRDA which was to increase, not decrease, internal union democracy.

While for the foregoing reasons we do not believe the "elected versus appointed" dichotomy necessarily determines the legality of removals from union positions for expressive conduct, at the same time we do not think petitioners' contentions represent a sound accommodation of the interests protected by Section 101(a)(2). While

the rights guaranteed by that section are broad, they are not absolute. In the terms of the provisos thereto, they are limited by "the responsibility of every member toward the organization as an institution" and by the need to avoid expressive conduct "that would interfere with [the union's] performance of its legal or contractual obligation." Petitioners' submissions do not adequately acknowledge that an official has certain responsibilities toward his union by virtue of his position therein that the average member does not have and that, at times, expression may be in conflict with those responsibilities.

Those whose responsibility it is to act on behalf of a union president can reasonably be expected to do so only if they share with the president a common perspective as to how they should perform their official assignments. Equating appointed with elected officials fails to take into account that in general the former are more likely than the latter to have the obligation to function as agents of the president.

We submit Section 101(a)(2) is the appropriate starting place in adjudging the legality of removal for expressive conduct. The language thereof (and the legislative history) reflects two central concerns: encouraging the free flow of ideas by union members and protecting the functioning of unions as institutions and in the fulfillment of their obligations. The former is reflected in the Section 101(a)(2) language creating rights and the latter in the provisos thereto.

The juxtaposition of these concerns indicates the proper standard for determining whether an official may be removed for expressive conduct, to wit, whether the particular expression at issue precludes the effective performance of the specific responsibilities assigned that official. See *Weyhmueller* v. *Janitors Union Local No. 1*,

509 F.Supp. 992, 997 (N.D.Ill. 1981) (whether member's expression "interfere[s] with the performance of his official duties"); cf. *Branti* v. *Finkel*, 445 U.S. at 518 (whether particular expression there at issue would interfere with "the effective performance of the public office involved"); *Pickering* v. *Board of Education*, 391 U.S. 563, 572-573 (1968) (teacher's criticisms of superiors not shown to have "impeded the teacher's proper performance of his daily duties in the classroom or to have interfered with the regular operation of the schools generally.")

By itself, this test is somewhat general. To resolve the instant case and to provide guidance to lower courts faced with other suits for reinstatement to union office, it is appropriate to elaborate thereon.

The test we have proposed requires a careful examination of the relationship, if any, between the specific expression involved and the particular responsibilities of the official. The responsibilities of a given office must be examined in their particularities, for these vary considerably from position to position. Do they include policy-making either on a long-range or *ad hoc* basis? See *Wood* v. *Dennis*, 489 F.2d 849, 858 (7 Cir. 1973) (Stevens, J. concurring), cert. den. 415 U.S. 960 (1974). Expression concerning union affairs is likely to bear more on a policy-making position than on one not involving the making of policy.

What is the degree of autonomy and/or discretion a member has in the performance of his responsibilities? Expression is less likely to interfere with performance of responsibilities which are essentially ministerial. On the other hand, the greater autonomy or discretion an official has, the more his views on important union issues are likely to influence how he performs those responsibilities.

Thirdly, to what extent is the role of the official to represent, among the members, the views of union leaders and to implement their program? Conversely, to what extent is it to represent the views of membership or his own views to union leaders? See *DeCampli* v. *Greeley*, 293 F.Supp. 746, 752 (D.N.J. 1968). The more it is the former, the more expression may bear upon performance of official responsibilities.

It is here that the factor of appointment is most significant. Where an official is appointed by the union president, it indicates his primary obligation is to represent the views of the president among the membership and to implement his program. Where this is true, the president is entitled to greater political loyalty. Appointment is not conclusive on an official's primary obligation, but we think it raises a rebuttable presumption that that obligation is primarily to represent the president and his program.

With respect to the expressive conduct at issue, does it concern matters of general public interest or does it relate to matters primarily of concern to the union in particular? See *Pickering* v. *Board of Education*, 391 U.S. at 571. Isn't there a difference between opposing a candidate for President of the United States and opposing a strike by one's own union? If the subject matter is of special concern to one's union, to what extent does the expression impact on the particular responsibilities of the plaintiff? Would opposition to voluntary COPE contributions likely bar effective performance of a shop stewardship?

Does the expression adversely affect an established union policy or position or does it simply run contrary to the views of those individuals currently holding office? For example, is an official's advocacy of strike preparations contrary to an already determined union position

or simply contrary to what leaders hope that policy will be. See, e.g., *Newman* v. *Communication Workers Local 1101*, 597 F. 2d 833, 836 (2 Cir. 1979), where the Court noted the plaintiff's advocacy of strike preparations, while contrary to the officers' views, had occurred prior to determination of the union's position. See also *Maceira* v. *Pagan*, 639 F.2d at 16 (substantive position expressed "in conformity with later union policy").

In general, the more expression impacts upon the particular responsibilities of the official, the more it can be said that expressions of disagreement with established programs or the views of those whom the plaintiff is representing preclude effective performance of his responsibilities and justify his removal. The considerations identified here do not provide a "bright line" providing a quick, simple resolution of the myriad of factual patterns which have been and will be presented to the courts. We submit they are, however, more faithful to the central concerns underlying the LMRDA than are the alternatives presented by the parties.[7]

We wish to emphasize that the LMRDA does not impose a "just cause" standard upon removal of union officials. A union may remove a member from a position with or without just cause, so long as it is not for expression which does not interfere with performance by that official of his assigned responsibilities.

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[7] The District Court discussed the question whether the removals of petitioners "were an attempt to stifle dissent in the union." 469 F.Supp. at 835. If that were their purpose, orders of reinstatement might be warranted. However, mere removals for expressive conduct do not without more establish such a purpose.

III. Petitioners Were Removed For Expressive Conduct Which Would Preclude The Effective Performance Of The Responsibilities Of A Local 20 Business Agent. The Grant Of Summary Judgment Was Proper.

In granting summary judgment, the District Court had before it depositions, affidavits and testimony adduced at the hearing on petitioners' motion for preliminary relief. These indicated the following undisputed facts:

Business agents of IBT Local 20 are fulltime, salaried employees appointed by the Local president and, under union by-laws, serving at the pleasure of the president. The joint resignation of all BAs in 1974 upon the election of a new president indicates an understanding that it is the prerogative and practice of a president to appoint new BAs at the beginning of his administration.

Local 20 business agents are voting members of the union's Stewards Council, its legislative and long-range policy-making body. BAs conduct collective bargaining negotiations. They have substantial responsibility for and discretion in the enforcement of the contract. This includes making the primary determination whether to take grievances to arbitration. Business agents are responsible for carrying out assignments from the president.

Petitioners actively supported the candidacy of incumbent union president Brown, running for reelection against respondent Leu. The election was hotly contested, as had been prior elections between Leu and Brown. A major point in Leu's campaign was his contention that members had not been adequately serviced by the incumbent officials. In short, he argued the local had not adequately fulfilled its responsibility to effectively represent the membership. Because the primary servicing is performed by

the BAs, the presidential election became, in essence, at least in part, a referendum on petitioners' p tormance of their union jobs. In opposing Leu, petitioners in effect defended the adequacy of their performance of their duties. The evidence does not indicate removal of petitioners was an attempt to stifle dissent.

In these circumstances, we believe Leu's removal of petitioners upon his election as president was reasonable and lawful under Section 101(a)(2). Local 20 BAs are plainly policy-making officials. They act primarily as agents or arms of the president in the fulfillment of his program for the local. The expression at issue affected union leadership and, by virtue of the campaign issues, concerned fulfillment of the union's obligation to represent the membership. This bore intimately on petitioners' responsibilities and the performance thereof.

Leu's election in these circumstances can reasonably be said to reflect the membership's view that the business agents in general were not providing adequate service. Where service to the membership is an important issue and petitioners oppose the successful presidential candidate pledged to improving that service, it is entirely reasonable for that candidate, at the beginning of his administration, to believe other persons could better perform the job of business agent as that position would exist under the new president's leadership. Particularly is this so where there is a long history of antagonism within the Local between the Leu and Brown forces. Any assumption to the contrary would not reflect the realities of how unions function as institutions.

We therefore believe the record adequately reflects the facts which are material to a reasoned resolution of the instant case and that there is no dispute as to these material facts. To require respondents to defend at trial

against petitioners' allegations would deny Local 20's president the authority granted him by union by-laws to select those persons he believes will best fulfill the responsibilities of BAs and to compel him to accept as BAs persons who, on the basis of their conduct and the surrounding circumstances, would not effectively perform their policy-making responsibilities as his agents. Under the circumstances presented, such a result would constitute an unwarranted intrusion into the internal affairs of a labor organization.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

Dated: December 30, 1981

Respectfully submitted,

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Certificate of Service

I, James Reif, a member of the bar of the Supreme Court, hereby certify that all parties required to be served have been served. Three (3) copies of the Motion of the National Labor Law Center for leave to file a brief as *Amicus Curiae* and the Brief of the National Labor Law Center as *Amicus Curiae* were mailed first class postage prepaid this 31st day of December, 1981 to Samuel G. Bolotin, Bolotin & Bolotin, Co., L.P.A., 2nd Floor Gardner Building, 506 Madison Avenue, Toledo, Ohio 43604 and to Jack Gallon, Gallon, Kalniz & Iorio Co., L.P.A., 3161 North Republic Blvd, Toledo, Ohio 43615.

JAMES REIF